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Mandated areas

Inter-Agency Support Group on Indigenous Issues; report on free, prior and informed consent**

Summary

Following the recommendations of the Permanent Forum on Indigenous Issues at its second session, and as agreed to at the Inter-Agency Support Group meeting held at Geneva, in September 2003, the United Nations Development Programme took the lead in coordinating and preparing the following report. The purpose of the report is to open an informed discussion on the issue of free, prior and informed consent.

* E/C.19/2004/1.

** The present document was submitted late to ensure the inclusion of the most recent information.

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Background and context

1. In a context of increasing recognition of the rights of indigenous peoples, the principle of free, prior and informed consent of indigenous peoples to development projects and plans that may affect them has emerged as the desired standard to be applied in protecting and promoting their rights in the development process.

2. There is no internationally agreed definition of the principle or mechanism for implementation; however, as United Nations agencies, funds and programmes seek to enhance their partnership with indigenous peoples the principle has been integrated into many United Nations policies related to indigenous peoples and/or involuntary resettlement, for example.

Methodology

3. A questionnaire was sent out to all indigenous people focal points of the United Nations system. It served as a guide for the United Nations system to address how the principle of free, prior and informed consent is understood and applied by United Nations programmes, funds agencies. It contained the following questions:

1. What understanding does your organization have of free, prior and informed consent?
2. Has your organization undertaken activities towards better understanding the principle and its related issues?
3. In what areas of work has it been applied and how?
4. Are there examples of how it has been applied at the policy level?
5. Is it used with specific reference to work with indigenous peoples? If so, how and where (i.e., policy, convention, etc.)?
6. How is it applied at the project development level?
7. Is it effectively implemented through specific and clear mechanisms?
8. What experiences has your organization had in exercising (or not) the principle?

4. Of the 18 agencies, 9 responded: 7 agencies responded to the questionnaire and 2 stated the issues did not apply directly to their agencies' work. It should also be noted that these responses may not reflect the official positions or statements of agencies on the subject.

5. Responses were received from the following agencies:

(a) United Nations Development Programme (UNDP);

(b) United Nations Population Fund (UNFPA);

(c) Food and Agriculture Organization of the United Nations (FAO);

(d) International Labour Organization (ILO);

(e) United Nations Institute for Training and Research (UNITAR);

(f) Office of the United Nations High Commissioner for Human Rights (OHCHR);

(g) World Health Organization (WHO).

Main outcomes

6. **Although no agency has adopted a formal official definition of the principle, each one recognizes the principle as being embedded in the human rights framework. As the United Nations heads towards integrating human rights into all dimensions of its work, issues of participation and consultation are key to the design, implementation and evaluation of any activity. Meaningful participation and consultation are seen as key to the principle of free, prior and informed consent. The principle has also been incorporated in policy and conventions in varying degrees. In order better to understand the application of this principle vis-à-vis indigenous peoples, the United Nations system has been involved in a range of activities including consultations, workshops, panel discussions and the commissioning of work.**

7. **With regard to implementation, some agencies have shown that the principle of free, prior and informed consent in relation to indigenous peoples is to a large extent implemented on an ad hoc basis in line with the general guidelines, legal instruments and principles through which they work. Implementation constraints or the degree of implementation can vary owing to the political situation of a country and the strength of its civil society, in addition to the capacity of United Nations country offices' to collaborate with the Government. In practice there are few mechanisms to measure effective free, prior and informed consent if there is no official legal/policy mandate.**

8. **Agencies revealed that there is an increased sensitivity to cultural needs in programme development and/or products. More than half surveyed are prioritizing the empowerment of indigenous peoples' communities to identify, design and implement their own demand-driven projects. Among the main challenges mentioned is building the capacity of both United Nations staff and indigenous peoples on issues related to free, prior and informed consent, as well as including and ensuring indigenous peoples' participation in decision-making bodies. Furthermore, attention also has to be given to issues of representation, that is, who is speaking on behalf of whom and the dissemination and use of data as it pertains to intellectual and cultural property rights.**

A. United Nations Development Programme

1. What understanding does your organization have of free, prior and informed consent?

9. UNDP understands the principle of free, prior and informed consent within the context of its policy of engagement, entitled "UNDP and indigenous peoples: A policy of engagement, 2001". The policy emphasizes partnerships with indigenous peoples that are built through transparent and participatory processes aimed at inclusion and empowerment. It stresses the UNDP role in capacity-building and in facilitating and brokering dialogues and initiatives that bring together Governments,

indigenous peoples and other non-State actors. It also incorporates in great detail how consultations should take place for projects involving indigenous peoples or any project that may affect them. These processes are key towards implementing free, prior and informed consent in UNDP activities.

10. UNDP has incorporated this principle in its policy of engagement with indigenous peoples. This policy direction has its roots in the 1998 UNDP policy of integrating human rights with sustainable development as well as in the fundamental principles of the United Nations reform of 1997 and 2002.

11. In its policy, UNDP applies the principle in three areas: in the context of development planning and programming; on issues of resettlement; and on issues of indigenous knowledge.

12. As stated in the policy, by incorporating the right to development in its work, UNDP fosters the full participation of indigenous peoples in its development processes and the incorporation of indigenous perspectives in development planning and decision-making. This right is of particular significance to indigenous peoples because in their experience, development has tended to be imposed upon their communities from outside, often resulting in violations of their right to development, by damaging ancestral lands, water and natural resources (para. 27).

13. Consistent with United Nations conventions such as ILO Convention No. 169, UNDP promotes and supports the right of indigenous peoples to free, prior informed consent with regard to development planning and programming that may affect them (para. 28).

14. Special attention is needed on issues of resettlement, especially those that involve any form of population transfer that has the aim or effect of undermining indigenous peoples' rights, and any form of assimilation or integration by other cultures or ways of life imposed on them without free, prior informed consent (para. 41).

15. Projects that gather and use indigenous customary knowledge should include measures that promote the recognition of this knowledge as intellectual and cultural property, as well as measures that prevent the dissemination of this knowledge without prior informed consent of the proprietors. Indigenous women must be involved in such activities as they are predominantly the custodians of that knowledge and often the most unlikely to benefit from the project and/or any potential benefit-sharing (para. 63).

2. Has your organization undertaken activities towards better understanding the principle and its related issues?

3. In what areas of work has it been applied and how?

16. In view of better understanding the principle of free, prior and informed consent and encouraging debate on the issue, UNDP at the inaugural session of the Permanent Forum, hosted a side event entitled "Indigenous peoples and development: the importance of free, prior informed consent".

17. The panel provided an opportunity to discuss the importance of free, prior informed consent to development programmes and plans involving indigenous peoples. Discussion focused on the impact such an endorsement has at both the

policy and grass-roots levels as well as its correlation with the right to development. It reviewed how indigenous peoples' campaigns have led to the endorsement of the principle in international standards and national legislation as well as the continuing struggles for its adoption in other international and national legislation and policies.

18. As the issue generated much interest, UNDP again hosted a side event on free, prior and informed consent at the 2002 Working Group on Indigenous Populations, to continue discussions and raise awareness.

19. Furthermore, the UNDP contribution to the Voluntary Fund for the Permanent Forum on Indigenous Issues has been partly earmarked for activities that aim towards exploring issues of implementation of free, prior and informed consent; and to exchange views and compare practices with other United Nations partners.

20. In 2002 a special indigenous peoples' component was incorporated into the UNDP/OHCHR Joint Programme on Strengthening (HURIST), which seeks to develop national capacity for the promotion and protection of human rights and in the application of a human rights approach to development programming. The indigenous peoples' component aims at:

(a) Building capacity of indigenous peoples' organizations, civil society organizations, UNDP and Governments for implementing and/or monitoring international and national agreements that either recognize indigenous peoples' rights or are of direct relevance to indigenous peoples;

(b) Promoting multi-stakeholder dialogues and initiatives with the State and non-State actors, including representatives from indigenous peoples' organizations and civil society organizations, which can serve to strengthen networks and raise awareness for influencing policy;

(c) Supporting and/or participating in development of pilot programmes, focusing on indigenous peoples' issues.

21. A notable key feature of the component is the human rights underpinning of the processes to support, as well as the genuine participation of, indigenous peoples in development. HURIST takes indigenous peoples' perspectives as a starting point and as its point of reference. One of the guiding principles of the indigenous peoples' component is the principle of free, prior and informed consent. In March 2004 the first pilot project was to be launched in Ecuador.

22. Furthermore, the UNDP capacity development group engages in research and activities that focus on participatory approaches and processes that bring together local stakeholders to help define social and economic policies for poverty reduction, all integral to free, prior and informed consent. These initiatives aim to foster home-grown processes and to build on the wealth of local knowledge and capacities.

23. UNDP, as an implementing agency of the Global Environment Facility (GEF), assists countries so that they can meet the obligations under the Convention of Biological Diversity. Several countries have undertaken capacity assessments in selected priority areas for assessing their capacity-building needs and defining country specific priorities. These documents are not designed for capacity-building itself, but to assess needs, identify priorities and build consensus on particular issues at the country level.

24. Among these issues is access and benefit sharing and traditional knowledge. Most of the country assessments help to recognize that free, prior and informed consent has to be implemented before any commercial/development activity can be authorized within or in the vicinity of a community reserve or protected area.

4. Are there examples of how it has been applied at the policy level?

25. UNDP has been recently working on an internal practice note on access and benefit sharing and traditional knowledge. The practice note describes why and how UNDP can support countries and communities in developing national policy frameworks and in designing specific projects aimed at protecting and sharing traditional knowledge. The practice note incorporates the principle of free, prior and informed consent within this context. It is stated that, if a local community or an indigenous people is to give its approval, it is necessary that this community be clearly defined. It is also important to have a clear understanding of who is the spokesperson giving the consent on behalf of the community or of the people.

26. In addition, the national strategic framework of the GEF small grants programme in Guatemala, for example, has been adapted to include a policy to give priority to fund projects that are designed, proposed and implemented by indigenous peoples. Therefore, in practice the GEF small grants programme reaches out to this constituency and encourages them to present projects that address their needs and follow pre-existent GEF requirements.

6. How is it applied at the project development level?

27. The culmination of the United Nations reform by the Secretary-General has been the creation of the coordinating and substantive tool of the common country assessment and the United Nations Development Assistance Framework that provides an umbrella to common country programming. The assessment and the Framework are instruments intended to improve country level coordination and coherence among United Nations Development Group agencies. They have been endorsed by the General Assembly and by the United Nations system as a whole, and are implemented through the resident coordinator system in country. They are intended to be nationally owned, long term and participatory processes, involving a broad range of development actors, including civil society. The assessment and the Framework strongly encourage civil society organizations to participate at all stages of the process, from policy dialogue to the formulation and monitoring input. The integration of human rights in the assessment and the Framework has further refined this principle.

28. The GEF small grants programme in Guatemala, for example, begins its project development phase with a training to its beneficiaries on project design and development as per the GEF requisites and priorities. During the training process interpretation/translation to native languages is always available to assure the proper understanding of the terms, concepts and details of project design. All training materials are also adapted so they have easy to understand language and graphics. In Costa Rica, for example, UNDP supported indigenous peoples' organizations to prepare an environmental impact assessment of the Boruca dam in their communities.

7. Is it effectively implemented through specific and clear mechanisms?

29. Although no specific mechanisms have been established to ensure implementation or voice grievances, it is important to note that the UNDP policy of engagement with indigenous peoples encourages the establishment of civil society advisory committees to UNDP at the country level, based on the existing global model. It is an important mechanism through which leaders of civil society organizations and indigenous peoples' organizations can provide strategic policy advice to help to develop a substantive agenda for cooperation and identify opportunities for joint advocacy on a number of priority areas of work.

30. UNDP also promotes discussions with State and non-State actors, including representatives from indigenous peoples' organizations and civil society organizations through multi-stakeholder initiatives that strengthen networks and raise awareness for influencing policy.

31. These kinds of mechanisms can be key in raising awareness of free, prior and informed consent; encouraging debate on implementation; ensuring that free, prior and informed consent can be included in development planning; and voicing concerns when free, prior and informed consent has not been taken into consideration.

8. What experiences has your organization had in exercising (or not) the principle?

32. The most important aspect of free, prior and informed consent is the timing of the consultation with indigenous peoples' communities.

33. The experience of UNDP has been that indigenous peoples' communities must be consulted at the early stages of the conceptualization of programmes. A consultation that presents a community with a fully developed programme and requests its approval within unrealistic deadlines would clearly contravene the principle of free, prior and informed consent. In fact UNDP has put on hold for considerable periods of time the implementation of programmes that have met with objections of indigenous peoples until the points of difference or misunderstanding could be clarified.

34. UNDP has learned various lessons from such experiences: (a) that the necessary time needs to be provided for internal discussion of ideas within communities before they provide feedback to UNDP interlocutors; (b) that consultations must be held with representatives of communities at various levels, such as traditional leaders and political leaders, and consent should be sought from such leaders; (c) it is also important to consult with women's and youth's associations and other actors of indigenous civil society; (d) it is important for indigenous communities to be meaningfully consulted throughout the process of implementation and for UNDP staff to be open to receiving their feedback and evaluation on a routine basis and to build solid working relations with indigenous leadership; and (e) that not consulting indigenous peoples who are end-users of development projects leads to delays, lack of sustainability and finally loss of resources.

35. The challenges that UNDP has encountered include: (a) UNDP staff in the field may not always be aware of policies developed at headquarters or have little understanding of what these policies mean; (b) pressures of work and remoteness do not always allow staff to be trained in these policies so as to make them operational;

(c) there is sometimes not enough support from headquarters; and (d) there are not yet specific and clear mechanisms for implementing the principle of free, prior and informed consent.

36. Lastly, UNDP hopes the Forum's initiatives will assist in the process.

B. United Nations Population Fund

1. What understanding does your organization have of free, prior and informed consent?

37. Principle 14 of the Programme of Action of the International Conference on Population and Development states that in considering the population and development needs of indigenous people, States should recognize and support their identity, culture and interests, and enable them to participate fully in the economic, political and social life of the country, particularly where their health, education and well-being are affected.

2. Has your organization undertaken activities towards better understanding the principle and its related issues?

38. Not only has UNFPA undertaken activities relating to understanding the principle, but all UNFPA work is based on this principle. UNFPA has been supporting initiatives and programmes to address the special needs of indigenous peoples, through developing quality, culturally sensitive reproductive health information and education programmes and services that respond to the needs of indigenous peoples and with their full participation.

3. In what areas of work has it been applied and how?

39. It is part of the Programme of Action of the International Conference on Population and Development and is applied in all activities of UNFPA country programming. More specifically, UNFPA funds national and regional projects responding specifically to the needs of indigenous peoples, in particular in Latin America and the Caribbean region. These projects focus on improving access of indigenous peoples to primary health-care centres and to improving the quality of the reproductive healthcare received. The projects take into account the importance of cultural values for quality of care and include training and counselling components for health workers, as well as the provision of reproductive health equipment and contraceptives.

4. Are there examples of how it has been applied at the policy level?

40. As an intergovernmental organization, UNFPA works with Governments to ensure that the principle is clearly reflected in national policies and programmes.

5. Is it used with specific reference to work with indigenous peoples? If so, how and where (i.e., policy, convention, etc.)?

41. It is used to the extent that indigenous peoples are included on the target populations of the country programmes. Also all UNFPA programming is rights-based and one principle that is continuously enforced is that of participation and inclusion.

6. How is it applied at the project development level?

42. Situation analysis takes it into account during needs assessment. UNFPA projects enable and support responsible voluntary decisions on reproductive health matters.

7. Is it effectively implemented through specific and clear mechanisms?

43. It is routinely implemented through UNFPA country programmes.

8. What experiences has your organization had in exercising (or not) the principle?

44. It collaborates with Governments.

C. Food and Agriculture Organization of the United Nations

1. What understanding does your organization have of free, prior and informed consent?

45. FAO has not adopted a formal definition of free, prior and informed consent. The principles underlying prior informed consent have been used and adapted to different areas of the organization's work, as described under question 3 below.

2. Has your organization undertaken activities towards better understanding the principle and its related issues?

46. The principle has been discussed as part of the FAO series of consultations on ethics in agriculture. The informed consent framework tends to emphasize the role of equal and universal human rights. Thus, a policy is unfair or inequitable when people lack effective means to claim goods or opportunities to which it is believed they are entitled by right. The opportunities to participate equally in decision-making or to give or withhold consent to risk exposures are protected by rights.

47. Staff training in social impact assessment, stakeholder analysis, participatory appraisal and participatory methods contributes to a better understanding of prior informed consent in the broad understanding outlined above.

3. In what areas of work has it been applied and how?

48. FAO applies prior informed consent, directly or in terms of its underlying principles, in a number of areas of activity.

49. **International trade in pesticides.** FAO has played a leading role in the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, which was adopted in 1998 and came into force in 2004. The Convention gives importing countries the power both to decide which chemicals they want to receive and the choice of excluding those they cannot manage safely.

50. **Food safety.** The principle of informed consent appears to have been taken into consideration in the case of food safety policies: how to ensure that people who bear risk do so knowingly and voluntarily.

51. **Plant genetic resources.** The International Treaty on Plant Genetic Resources for Food and Agriculture, which will enter into force in 2004, has several provisions

that are of importance for indigenous and local communities and embody some of the core principles associated with prior informed consent. Article 5.1 (d) refers to indigenous and local communities and article 9, on farmers' rights, and paragraph 9.2, refers to the protection of traditional knowledge and benefit sharing.

52. **Preparation and assessment of investment projects.** The mandate of the Investment Centre of FAO is to assist developing member countries to mobilize international and national funding for agricultural and rural development by assisting Governments in the preparation and formulation of programmes or projects suitable for funding by various financing institutions (World Bank, IFAD, the African, Asian and Inter-American Development Banks, the European Bank for Reconstruction and Development, the United Nations Capital Development Fund, etc.). The Centre does not have its own policy on indigenous peoples, but rather applies those of the international financing institutions with whom it has cooperative agreements, depending on which institution has requested its services. By extension, the Centre's understanding of "free, prior and informed consent" is that of its partners. The Centre's partner international financing institutions that have an explicit indigenous people's policy include the World Bank, the Asian Development Bank and the Inter-American Development Bank. In the course of social assessments and other participatory project design processes in Asia and Latin America where indigenous people are present, consultations are held with indigenous peoples and their representatives.

53. **Provision of policy and legal technical assistance concerning natural resource access and management.** In a general but nonetheless substantive way certain principles underlying the concept of prior informed consent are stressed in FAO technical work, particularly in relation to issues of natural resource management and access. Increasingly, for example, the trend in new natural resource laws around the world is to create platforms on which various stakeholders — in many cases, indigenous peoples who may be heavily dependent on such resources — have the opportunity to participate meaningfully in decisions that affect their livelihoods. Thus, one finds provisions that require extensive local consultation with forest communities about management plans that might affect them. In some cases, the provisions stop short of requiring actual consent to government actions, instead emphasizing only the right to information and the right to be heard. In other cases, especially where there are long-standing community claims over the land and resource, there may be rights (implicit or explicit) actually to refuse on the part of the participating community.

4. Are there examples of how it has been applied at the policy level?

54. There is a general understanding that the principles underlying the concept of prior informed consent provide a broad framework that sheds light on and should inform policy analysis and formulation.

5. Is it used with specific reference to work with indigenous peoples?

55. This is mostly the case in the area of rural development projects design and implementation, and in project evaluation, according to the principles stated in questions 2 and 3 above.

56. In the work of the Investment Centre, when doing social assessments and other participatory project design processes in Asia and Latin America where indigenous people are present, consultations are held with indigenous peoples and their

representatives. Centre guidelines call for project designers to consult directly project stakeholders and intended beneficiaries of all projects that the Centre assists in designing, without regard for whether or not they are concerned with indigenous peoples. In addition, the Centre applies the specific procedures of the World Bank, IFAD, the Asian Development Bank, the Inter-American Development Bank and UNDP to projects that it prepares on behalf of those agencies.

6. How is it applied at the project development level?

57. This is implemented through the following methods and approaches:

(a) Stakeholder analysis and consultation;

(b) Village-level pest risk analyses and other participatory processes feeding into project design, supervision and impact assessment;

(c) Design of demand-driven projects that empower indigenous communities to identify their own needs and to implement their own participatory sub-projects.

7. Is it effectively implemented through specific and clear mechanisms?

58. Aside from the Rotterdam Convention, there are no mechanisms of implementation entirely specific to the principles of prior informed consent. The methods and approaches mentioned above are also used in the framework of principles for participation and inclusive development to the benefit of the rural poor in general.

D. International Labour Organization

1. What understanding does your organization have of free, prior and informed consent?

59. The concept of free, prior and informed consent, in the ILO context, is understood within the context of ILO Convention No. 169 concerning Indigenous and Tribal Peoples in Independent Countries (1989). The Convention deals primarily with the concepts of consultation, participation, free and informed consent, appropriate procedures and prior consultation in specific circumstances. These are explained in more detail below.

60. The central themes of Convention No. 169 are consultation and participation. The Convention requires that indigenous and tribal peoples be consulted and are able to engage in free and informed participation in policy and development processes that affect them.

61. Article 6 of the Convention reads as follows (emphasis added):

"1. In applying the provisions of this Convention, Governments shall:

"(a) Consult the peoples concerned, through *appropriate procedures* and in particular through their *representative institutions*, whenever consideration is being given to legislative or administrative measures which may affect them directly;

"(b) Establish means by which these peoples can *freely participate*, to at least the same extent as other sectors of the population, at all levels of

decision-making in elective institutions and administrative and other bodies responsible for policies and programmes which concern them;

"(c) Establish means for the full development of these peoples' own institutions and initiatives, and in appropriate cases provide the resources necessary for this purpose.

"2. The consultations carried out in application of this Convention shall be undertaken, in *good faith* and in a *form appropriate to the circumstances*, with the *objective of achieving agreement or consent* to the proposed measures."

62. This means that the consultation procedures should take account of indigenous and tribal peoples' traditional methods of decision-making. The parties involved should seek to establish a dialogue allowing them to find appropriate solutions in an atmosphere of mutual respect and full participation. Effective consultation means real and timely consultation. Convention No. 169 stipulates that the peoples involved should have the opportunity to participate freely at all levels in the formulation, implementation and evaluation of measures and programmes that affect them directly. Another important component of the concept of consultation is that of representativity. While acknowledging that it is difficult in many circumstances to determine who represents any given community, if an appropriate consultation process is not developed with the indigenous and tribal institutions or organizations that are truly representative of the peoples in question, then the resulting consultations would not comply with the requirements of the Convention.

63. The Convention specifies that consultation should take place specifically in the following circumstances, although it should also constitute a general principle, and be applied as such:

(a) When considering legislative or administrative measures that are likely to affect indigenous and tribal peoples (article 6.1 (a));

(b) Prior to exploration or exploitation of sub-surface resources (article 15.2);

(c) When any consideration is being given to indigenous and tribal peoples' capacity to alienate their lands or to transmit them outside their own communities (article 17);

(d) Prior to relocation, which should take place only with the free and informed consent of indigenous and tribal peoples (article 16);

(e) On the organization and operation of special vocation training programmes (article 22).

64. In these circumstances, it is clear that the concept of free, prior and informed consent is covered by Convention No. 169.

65. The second fundamental principle of the Convention is that of participation. This includes free participation at all levels of decision-making in elective, administrative and other bodies responsible for policies and programmes that concern indigenous and tribal peoples, and participation in the formulation, implementation and evaluation of plans and programmes for national and regional development. The Convention also requires the establishment of means for the development of indigenous and tribal peoples' own institutions and initiatives.

66. Although participation should also be applied in a general manner, the Convention does specify instances in which it is obligatory.

67. The statement of this principle does not mean, however, that a lack of consent will be sufficient grounds under the Convention to block a development programme or project. The Convention requires that procedures be in place whereby indigenous and tribal peoples have a realistic chance of affecting the outcome — it does not require that their consent to the proposed measures is necessary.

2. **Has your organization undertaken activities aimed at better understanding of the principle and its related issues?**

3. **In what areas of work has it been applied and how?**

68. ILO has several projects and programmes that specifically address indigenous and tribal peoples, and several that affect indigenous and tribal peoples, although these peoples may not be the specific target group of these projects or programmes. All ILO projects or programmes that affect indigenous and tribal peoples follow the principles of Convention No. 169. The two ILO projects that deal only with these peoples ensure that indigenous and tribal peoples are consulted on, and participate in, the design, implementation and evaluation of projects. Many projects are requested by indigenous peoples organizations themselves. Through these projects, indigenous and tribal peoples are also trained in human rights and advocacy including the concept and practice of free, prior and informed consent. The establishment of well-informed groups of indigenous/tribal representatives who have the mandate of their communities to represent them is paramount to the success and sustainability of ILO projects in this area.

4. **Are there examples of how it has been applied at the policy level?**

69. There are a number of examples within the context of the supervision of Convention No. 169:

(a) In Norway, which ratified Convention No. 169 in 1990, a new way of taking advantage of the ILO supervisory mechanisms has been developed. Based on a suggestion contained in the report form for Convention No. 169, the Government of Norway sends its reports to the Saami Parliament for comments. Norway has also asked ILO to engage in a parallel dialogue with the Saami Parliament, thus enabling Saami representatives to play a formal part in the supervisory process;

(b) A number of representations filed with ILO relate directly to consultation and participation. Further information can be found on the ILOLEX database at www.ilo.org (in international labour standards).

5. **Is it used with specific reference to work with indigenous peoples? If so, how and where (i.e., policy, convention, etc.)?**

70. Convention No. 169 provides the guidelines for ILO work with indigenous and tribal peoples.

6. **How is it applied at the project development level?**

71. At the project development level, there are a number of approaches that are used by ILO in respect of indigenous and tribal peoples.

Project to promote ILO policy on indigenous and tribal peoples

72. This project works at the policy level, and its approaches to project design, development and implementation vary according to the specific circumstances of a given project country. The main objectives of this project are as follows:

(a) The development, adoption and implementation of policies that integrate the rights, as conveyed in Convention No. 169, as well as the needs and priorities of indigenous and tribal peoples in the countries assisted by the project;

(b) The contents and principles of Convention No. 169, and where applicable Convention No. 107 concerning the Protection and Integration of Indigenous and Other Tribal and Semi-Tribal Populations in Independent Countries (1957), will be better known and used, in particular in the countries in which the project works;

(c) The capacity of indigenous and tribal peoples to participate in development processes and programmes, and to defend their own interests, will be strengthened.

73. Project countries are identified according to a number of considerations: the legislative and policy framework for the protection of the rights of indigenous and tribal peoples; requests from Governments for assistance; requests from indigenous and tribal peoples for assistance; and the general situation of indigenous and tribal peoples in specific countries. In all cases, an initial assessment of the policy framework for the protection of the rights of indigenous and tribal peoples is undertaken as an initial step. The project endeavours to ensure that indigenous and tribal peoples are informed about projects prior to their initiation, and to ensure that their concerns are taken into account in project design. To this end, it is essential that the indigenous/tribal persons with whom the project works with are truly representative of their peoples or communities. An example of the process of project development is in Kenya, where the project was approached by indigenous and tribal peoples' organizations for assistance concerning their participation in the constitutional review. An initial consultation workshop was held in November 2001 with representatives from all the main indigenous communities in Kenya. This workshop served a dual purpose: to train the participants on national legislation and international human rights standards of relevance to them; and to gather the views of participants on their own priorities for a new constitution. The workshop served to establish a consultative group of indigenous peoples' representatives (the pastoralists and hunter-gatherers network), that has since served as the focal point for ongoing engagement with the constitution review process. The project is ongoing, with technical and financial support from ILO. A current priority is to develop a dialogue with the Government, so that indigenous and tribal peoples are able to put forward their concerns and enter into a fruitful dialogue with their government, ensuring that they are consulted on matters of concern to them.

Interregional Programme to Support Self-Reliance of Indigenous and Tribal Communities through Cooperatives and Other Self-Help Organizations

74. The Interregional Programme to Support Self-Reliance of Indigenous and Tribal Communities through Cooperatives and Other Self-Help Organizations (INDISCO Programme) works primarily at the grass-roots level, and aims to strengthen the capacities of indigenous and tribal peoples, helping them design and implement their own development plans and initiatives through their own

organizations while safeguarding their traditional and cultural values. The development objective of the first phase was to contribute to the improvement of socio-economic conditions of indigenous and tribal peoples through demonstrative pilot projects and the dissemination of best practices for policy improvement. Thus, it was aimed at demonstrating viable models of indigenous peoples' participatory development through selected pilot projects. Pilot projects have demonstrated tangible and viable examples of practical partnerships in the field of sustainable development. In the second phase, activities have been concentrated on linking grass-roots level experiences with the policy environment. Good practices of community-driven participatory projects run by the indigenous peoples themselves have been disseminated and used to influence the policy environment, and to strengthen national policies and programmes aimed at protecting the rights and reducing poverty of indigenous and tribal peoples.

75. The methodology of the INDISCO Programme is based on a community-driven participatory approach to project design and implementation in which the participation and consultation of the indigenous and tribal peoples is a core principle. The design, development and implementation of project activities are undertaken by the indigenous peoples themselves, facilitated by local partner non-governmental organizations and associated with policy development at the government level. This gives ILO a mediating and facilitating role between the various involved stakeholders.

76. Most projects address core immediate needs as expressed by the communities themselves, and the projects often provide direct support to literacy training, cooperative management, skills and training in income generating activities. The concept is based on full participation and control by the communities themselves. INDISCO experiences from India, the Philippines, the United Republic of Tanzania, Thailand and Viet Nam in particular show that strengthening indigenous and tribal peoples' own organizations has increased their ability to engage in a more informed and participatory dialogue with their respective governments, both at the local and national levels.

E. United Nations Institute for Training and Research

77. For UNITAR the issue of free, prior and informed consent is addressed in the training programme to enhance the conflict prevention and peace-building capacities of indigenous peoples' representatives.

78. The training programme invites a senior indigenous expert to conduct a session on dialogue processes between indigenous peoples, Governments and the private sector. This session includes information on free, prior and informed consent. This year, the Special Rapporteur who is conducting a study on indigenous peoples' permanent sovereignty over natural resources, will also be invited to address programme participants. The Millennium Development Goals and reports are provided to each participant as reference materials in their handbook for the training.

F. Office of the United Nations High Commissioner for Human Rights

1. What understanding does your organization have of free, prior and informed consent?

79. The Special Rapporteur of the Commission on Human Rights on the situation of the human rights and fundamental freedoms of indigenous people, in his report on the impact of large-scale or major development projects on the human rights and fundamental freedoms of indigenous peoples and communities (E/CN.4/2003/90) concludes that:

> "66. ... Free, prior, informed consent is essential for the human rights of indigenous peoples in relation to major development projects, and this should involve ensuring mutually acceptable benefit sharing, and mutually acceptable independent mechanisms for resolving disputes between the parties involved, including the private sector. ...
>
> "70. ... If their human rights are to be effectively protected, they must be able to participate freely as equal partners and citizens in the decision-making processes that affect their future survival as specific peoples. ...
>
> "73. ... Any development projects or long-term strategy affecting indigenous areas must involve the indigenous communities as stakeholders, beneficiaries and full participants, whenever possible, in the design, execution and evaluation stages. The free, informed and prior consent, as well as the right to self-determination of indigenous communities and peoples, must be considered as a necessary precondition for such strategies and projects. Governments should be prepared to work closely with indigenous peoples and organizations to seek consensus on development strategies and projects, and set up adequate institutional mechanisms to handle these issues."

80. A workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights was held at Geneva from 5 to 7 December 2001 pursuant to resolution 2000/15 of the Subcommission on the Promotion and Protection of Human Rights. It was organized by OHCHR in collaboration with the United Nations Conference on Trade and Development (UNCTAD) and ILO.

81. The workshop recalled the Vienna Declaration and Programme of Action (part I, para. 20, and part II, para. 30), in which States recognized the importance of the free and informed participation of indigenous peoples in matters affecting them as a means of contributing to their rights and well-being.

82. The workshop recognized the link between indigenous peoples' exercise of their right to self-determination and rights over their lands and resources and their capacity to enter into equitable relationships with the private sector. It was noted that indigenous peoples with recognized land and resource rights and peoples with treaties, agreements or other constructive arrangements with States, were better able to enter into fruitful relations with private sector natural resource companies on the basis of free, prior, informed consent than peoples without such recognized rights.

2. **Has your organization undertaken activities towards better understanding the principle and its related issues?**

Workshop on indigenous peoples, private sector natural resource, energy and mining companies and human rights held in 2001

83. The workshop also recommended, among other things, that States, the United Nations system, indigenous peoples and the private sector should elaborate a framework for consultation, benefit sharing and dispute resolution with respect to private sector projects affecting indigenous peoples; and that consultations between indigenous peoples and the private sector should be guided by the principle of free, prior and informed consent of all parties concerned.

84. The workshop recommended that the Working Group on Indigenous Populations should contribute to a framework for consultation, benefit sharing and dispute resolution in respect of private sector natural resource and energy projects affecting indigenous peoples, guided by the principles of full and effective participation at all levels by indigenous peoples in decisions affecting their lives, and free, prior and informed consent to projects and developments on their lands.

Norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights

85. In 1999, the Subcommission established a sessional working group on the working methods and activities of transnational corporations. The working group has developed a set of norms on the responsibilities of transnational corporations and other business enterprises with regard to human rights (E/CN.4/Sub.2/2003/12/Rev.2), as well as an extensive commentary to the norms. The norms reiterate the overarching principle of State responsibility for the promotion and protection of human rights. The norms, however, also state that transnational corporations, within their respective spheres of activity and influence, also have a responsibility to protect the human rights of the different stakeholders.

86. Some specific concerns of indigenous peoples with respect to transnational corporations are not included in the norms. The principle of free, prior and informed consent of indigenous peoples stipulated in article 30 of the draft declaration on the rights of indigenous peoples is not addressed in the draft norms, nor is the question of dispute resolution in cases of disagreements between indigenous peoples and transnational corporations.

87. The Working Group on Indigenous Populations decided that it would begin the elaboration of a legal commentary on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources at its twenty-second session, in 2004. A preliminary working paper is currently being prepared that could be the basis for a future standard-setting activity.

3. **In what areas of work has it been applied and how?**

88. The principle of free, prior and informed consent is being applied in the organization of OHCHR activities in the field of indigenous peoples. Indigenous peoples participate in all events regarding them, such as the Working Group on Indigenous Populations and the working group on the draft declaration, as well as all

workshops organized by the office. This way they are able to contribute to all recommendations put forward by this body to the United Nations system prior to their drafting. They have been actively involved in the drafting of the draft declaration and are now active participants in the negotiations taking place at the working group.

89. Since 1987, all seminars organized by OHCHR on indigenous issues have included an indigenous chairperson or rapporteur to chair the seminar or draft the report and recommendations. In recent seminars organized by OHCHR, indigenous individuals were invited as experts and formulated and approved the conclusions and recommendations of the seminars.

90. The United Nations Voluntary Fund for Indigenous Populations was established with the purpose of assisting representatives of indigenous communities and organizations to participate in the deliberations of the Working Group on Indigenous Populations, the open-ended intersessional Working Group of the Commission of Human Rights on the draft declaration on the rights of indigenous peoples and the Permanent Forum by providing them with financial assistance.

91. Similarly, the Voluntary Fund for the International Decade of the World's Indigenous People was established for the purpose of funding projects and programmes during the Decade

92. Decisions on funding for participation in the above mentioned events and on the project grants are taken by the Board of Trustees of the Fund, which consists of indigenous persons.

4. Are there examples of how it has been applied at the policy level?

93. The Working Group on Indigenous Populations is about to begin the elaboration of a legal commentary on the principle of free, prior and informed consent of indigenous peoples in relation to development affecting their lands and natural resources. This shows that this principle is gaining importance in the international arena. Also, the draft declaration in its articles 10, 12, 20, 27 and 30 refers to the principle of free and informed consent.

5. Is it used with specific reference to work with indigenous peoples? If so, how and where (i.e., policy, convention, etc.)?

94. The draft declaration on the rights of indigenous peoples refers to free, prior and informed consent in article 10 on forced relocation; article 12 in relation to culture and intellectual property; article 20 vis-à-vis legislative and administrative measures taken by the States; article 27 with regard to indigenous peoples' lands, territories and resources, and article 30, which deals with development planning.

7. Is it effectively implemented through specific and clear mechanisms?

95. The criteria for selection of projects to be financed through the Voluntary Fund for the International Decade of the World's Indigenous People clearly state that:

(a) Projects should be of direct benefit to indigenous people in all parts of the world;

(b) Projects should be prepared by or in full support and consultation with indigenous people.

96. Indigenous peoples are invited to provide inputs and information on their human rights situation before the Working Group on Indigenous Populations and during all workshops and events organized by OHCHR.

8. What experiences has your organization had in exercising (or not) the principle?

97. The Working Group on Indigenous Populations was the first United Nations body to be open to the participation of all indigenous peoples irrespective of the legal status of their organization or community based on the principle of self-identification. Indigenous peoples participate in the debate and in the elaboration of the recommendations of the Working Group. Sessions of treaty-bodies are also open to indigenous non-governmental organizations, so they can provide information on their situation. The need for consultative or special consultative status with the Economic and Social Council as a prerequisite to participate in the working group on the draft declaration has limited indigenous peoples' participation in this event. However, the indigenous caucus, the decision-making and information exchange channel of the indigenous peoples during both events, functions on the basis of the principle of free, prior and informed consent.

G. World Health Organization

98. WHO has recognized the essential requirement of personal informed consent to medical treatment and research in countless contexts, from screening for HIV/AIDS to donation of an organ for transplantation. In the context of public health and biomedical research, WHO has produced or facilitated numerous guidance documents, among them operational guidelines for ethics committees that review biomedical research (Special Programme for Research and Training in Tropical Diseases (TDR)/WHO, 2000) and international ethical guidelines for biomedical research involving human subjects (Council for International Organizations of Medical Sciences (CIOMS), 2002). Various units also conduct training seminars on research ethics and programmes designed to increase the capacity of research institutions to provide ethical review of research protocols, with special attention to informed consent.

99. Although WHO does not have a special position on prior informed consent with respect to indigenous peoples, it has commissioned work in this area, and a document on indigenous peoples and participatory health research is now at a draft stage. The comments included in this submission address informed consent in the context of health research, and in summary conclude that: (a) in all situations, it is necessary to take account of cultural barriers and the present governing infrastructures of indigenous peoples; and (b) vigilance is required to maintain the degree of consent desired for all research and development projects.

100. Existing international human rights instruments on indigenous peoples emphasize the principles of participation and free and informed consent: these include ILO Convention No. 169 and the draft declaration on the rights of indigenous peoples, which contain provisions on free and informed consent with respect to relocation; on restitution of property taken without free and informed consent; on participation and free and informed consent with respect to legislative or administrative measures; and on projects affecting lands, territories and other resources.

101. The most recent WHO publication on the subject emphasizes the premise that health research involving indigenous peoples, whether initiated by the community itself or by a research institute, needs to be organized, designed and carried out in a manner that takes account of cultural differences, is based on mutual respect, and is beneficial and acceptable to both parties. Fundamental differences in perception may include differing perspectives on what constitutes public and private life, notions of property, and the rights and interests of the group or collectivity as opposed to those of the individual. It is therefore important to find ways to ensure productive and proper cooperation between outside entities (such as research institutions) and indigenous peoples.

102. To prevent various forms of exploitation, a meaningful informed consent process is necessary. Such a consent process can only be achieved if the education, culture and language of indigenous peoples are taken into account, so that a truly informed status can be achieved. While it is good practice to obtain the permission of wider indigenous organizations (umbrella groups), such permission does not take the place of local community approval, or in the case of health research, individual consent. These principles must clearly extend to any process of development in areas concerning indigenous peoples. To formalize such steps, it might be useful for the indigenous peoples and research groups jointly to prepare a research agreement. That would help to ensure that all steps of the research process are understood, and agreed conditions and responsibilities on each side are clearly spelled out. In this way, long-term projects are able to ensure that consent for all stages of the research initiative has been properly obtained. The original agreement of indigenous peoples to allow health research to be conducted does not extend indefinitely, however. Collective approval may be withdrawn in cases where an irresolvable conflict or a clear violation of ethical principles occurs. Those projects that have a long duration should reaffirm this approval periodically. This is absolutely essential if research is to be continually deemed "consensual".

103. Upon receiving consent a research group can have certain expectations of the involved indigenous community: (a) the research will be satisfactorily concluded with the agreed level of community participation and cooperation, provided that there are no changes in the agreed approach, expected outcomes, or anticipated benefits; and (b) where prior agreement designates the indigenous people as the final owner of research data, requests by the research institution for further use of the information will be considered and authorized by the indigenous people. Such requests should be discussed and agreed in advance, and confirmed by the relevant research ethics mechanisms in accordance with usual research procedures.

104. Fully incorporating indigenous peoples into the process of approving health research is one of the major challenges that face international organizations. In some cases, populations have indigenous-controlled organizations to represent indigenous communities. Such organizations help to protect the rights of indigenous peoples with regard to health research. However, when such organizations are lacking it is imperative that members of relevant indigenous peoples are incorporated into ethics boards that review and approve the proposed research. Otherwise, it is impossible to assure the full prior consent of indigenous peoples to research programmes that directly concern their life and development.

105. Another question that has arisen when trying to obtain individual consent of indigenous peoples to participate in research programmes is a reluctance of

participants to sign a written document. Such situations are likely to be encountered only infrequently, but, in such cases, agreement should be reached in accordance with acceptable local practice. The process followed should be the same as that for written consent. It is the duty of ethics review committee to ensure that informed consent has been adequately demonstrated in a culturally appropriate way.

106. Yet another important issue to be considered is the question of how the results of the research are disseminated. As indigenous communities build capacity to do their own research, they also control how the results are used and disseminated. Furthermore, the issue of intellectual property rights should be explored when the research concerns indigenous knowledge that could benefit the population in general.